

***United States Court of Appeals
for the Second Circuit***



APPENDIX

77-1287

IN THE
UNITED STATES COURT OF APPEAL
FOR THE SECOND CIRCUIT

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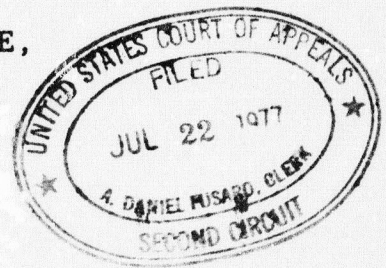
IN RE THE GRAND JURY EMPANELLED
October 14, 1976

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

JOINT APPENDIX

REAVIS & McGRATH
345 Park Avenue
New York, New York 10022
Attorneys for Appellant
A Witness Subpoenaed To
Testify Before The Grand Jury
(212) 752-6816

UNITED STATES DEPARTMENT OF JUSTICE,
ANTITRUST DIVISION - Appellee
Washington, D.C. 20530
(202) 739-2577



PAGINATION AS IN ORIGINAL COPY

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BEST COPY AVAILABLE

SUBPOENAS & HABEAS CORPUS AD TEST

M 11-188

PROCEEDINGS

6-27-77 IN RE: GJS SERVED ON PEDRO ARCHULETA---Filed affdvt & show cause order why witness should not be held in contempt, ret. 6-30-77 at 2 P.M. rm. 506. Bonsal, J.

6-27-77 IN RE: GJS SERVED ON PEDRO ARCHULETA---Filed govt's memo of law.

6-28-77 IN RE: GJ PROCEEDINGS,---Filed brown envelope ordered impounded, sealed & placed in vault. Place on calander in Part I thurs. 6-30-77 in Rm. 506 at 9:45 A.M. Brieant, J.

6-29-77 IN RE: GJS SERVED ON PEDRO ARCHULETA---Filed affdvt in response to show cause order why witness should not be held in contempt.

6/28-77 IN RE: THE GRAND JURY EMPANELLED 10-14-76--Filed copy of show cause order to compel disclosure of material before the Grand jury that are in possession of the Dept. of Justice-ret. 6-30-77 (filed in Court)

6-30-77 IN RE: THE GRAND JURY EMPANELLED 10-14-76--Filed memo endorsed on show cause order filed in Court 6-28-77--Motion denied. See minutes of this date. So ordered-Owen, J.

6-30-77 IN RE: THE GRAND JURY EMPANELLED 10-14-76--Filed notice of appeal by witness subpoenaed to appear before grand jury

6-29-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test for Chali-Prsleepmanowong, ret. 7-6-77.

6-29-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test for Joseph F. Healy. Writ issued, ret. 7-11-77. Frankel, J.

6-30-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test for Robert-DeChabert. Writ issued ret. 7-13-77.

7-1-77 USA -v- JOHN DOE---Filed one brown envelope ordered sealed until further order of the court. Owen, J.

7-1-77 IN RE: GJS SERVED ON PEDRO ARCHULETA---Filed memo endorsed on show cause order dated 6-22-77, the motion is granted, see minutes of 6-30-77. Si ordered. Owen, J.

7-1-77 IN RE: GJS SERVED ON PEDRO ARCHULETA,---Filed notice of appeal of Pedro Archuleta for contempt.

7-5-77 IN RE: PASQUALE MASCIA,---Filed affdvt, notice of motion & certificate of service of Michael B. Pollack, ret. 7-7-77 at 9:30 A.M. before Haight, Jr.

7-5-77 IN RE: GJS SERVED ON PEDRO ARCHULETA,---Filed defts memo of law.

7-5-77 IN RE: AMERICAN EXPRESS CO. CARD DIV. AGGT. AMERICO BADILLO VEIGA---Filed transcript of record of proceeding. Filed 5-2-77 Knapp, J. 5-6-77, 5-13-77 KNAPP, J.

7-5-77 IN RE: GJW FRANK BALLANTE,---Filed Filed transcript of record of proceeding. Filed 5-16-77, 5-20-77, 5-27-77 Stewart, J.

7-1-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test for Hobart Nor Darling. Writ issued, ret. 8-3-77.

7-1-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test for Robert Han Writ issued, ret. 7-11-77.

7-5-77 USA -v- JOHN DOE---Filed writ of H/C ad test, writ allowed, Bonsal, J.

7-6-77 IN RE: JOHN P. FLANNERY---Filed brown envelope, ordered impounded sealed & placed in cashier's vault. Brieant J.

7-6-77 IN RE: AFFDVT OF HARRY BATCHELDER AUSA ORDERED IMPOUNDED SEALED & placed in cashiers vault Brieant J.

7-6-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test for Clarence-William Gardner. Writ issued, ret 8-8-77

7-8-77 USA -v- JOHN DOE---Filed writ of H/C ad test for Clarence Gardner, writ allowed. Cooper, J.

7-8-77 USA -v- JOHN DOE---Filed writ of H/C ad test for Bruce Taylor, writ allowed. Owen, J.

7-7-77 IN RE: GJS served on Pedro Archuleta---Filed record on appeal certiff & transmitted to the USC of appeals on 7-7-77.

- 8-77 USA -v- John Doe---Filed writ of H/C ad test for Harvey John Poll.
writ allowed. Motley, J.
- 8-77 IN RE: DAVID HARDING GJ WITNESS---Filed one brown envelope ordered
sealed until further order of the court. Ward, J. AUSA A. Levine
- 11-77 IN RE: JOHN DOE GJ APPEARANCE--- Filed transcript of record of proceedings, dated 5-4-77
Knapp, J.
- 11-77 IN RE: GJS DT TO INRAM CORP. et ano filed transcript of record of proceedings, dated 5-10
Knapp, J.
- 11-77 IN RE: THOMAS MANCUSO & VINCENT SAUSTO Filed transcript of record of proceedings, dated
5-2-77 Knapp, J.
- 11-77 IN RE: DOCUMENTS SUBPOENAED BY 5-76 ADDITIONAL GJ.---Filed U.S.C.A
affirming decision of the court. Judgment entered 7-12-77 Clerk
of court.
- 11-77 USA -v- JOHN DOE---Filed writ of H/C ad test for Hunter B. Brashier
writ allowed. Knapp, J.
- 11-77 USA -v- JOHN DOE---Filed writ of H/C ad test for Hermenigildo Díaz-
Caballero. writ allowed. Edelstein, J.
- 11-77 IN RE: GJ EMPANELLED 10-14-76 ,---Filed order that S.D. court reporters
deliver to parties & attnys the transcripts of the hearings on the
application for the order to show cause & on the motion to compel
discovery in this proceeding in connection with appeal. Reant, J.
- 11-77 IN RE: GJ OF CICCONI, Filed transcript of record of proceedings, dated 5-27-77 Owen, J.
- 11-77 Filed transcript of record of proceedings, dated 6-16-77
- 13-77 IN RE: GJS SERVED ON PEDRO ARCHULETA,---Filed letter. dated 7-1-77
to the Hon. Morris E. Lasker from the USDJ.
- 11-77 IN RE: ANGELO PRISCO,---Filed order granting furlough from MCC -on 7-12-77
8:00 A.M. to 8:00 P.M. for funeral services. MacMahon, J.
- 12-77 IN RE: DRUG FREE SOCIETY,---Filed brown envelope ordered sealed. Bonsal, J.
- 13-77 IN RE: GJS SERVED ON PEDRO ARCHULETA---Filed supplemental record has
been certified & transmitted to the USCA for second circuit 7-13-77.
- 13-77 USA -v- JOHN DOE---Filed affdvt for writ of H/C ad test. for Hermenigildo
Díaz writ allowed. Werker, J.
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed memorandum of law
in support of motion to compel disclosure.
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed affidavit
in opposition to motion.
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed memorandum of
law in opposition to motion to compel disclosure.
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed affidavit of
Joseph Clark.
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed reply memorandum
in support of motion to compel disclosure.
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed transcript record
of proceedings dtd: 6/28/77
- 15-77 In re: The Grand Jury Empanelled Oct. 14, 1976---Filed transcript record
of proceedings dtd: 6/30/77

FILED
JUL 2 1977
BY [Signature]
[Signature]

- 8-77 USA -v- John Doe---Filed writ of H/C ad test for Harvey John Poll
writ allowed. Motley, J.
- 8-77 IN RE: DAVID HARDING GJ WITNESS---Filed

SOUTHERN DISTRICT COURT NEW YORK

Index No.

IN RE THE GRAND JURY EMPANELLED OCTOBER 14, 1976

ORDER TO SHOW CAUSE AND AFFIDAVIT

REAVIS & McGRATH

345 Park Avenue
New York, New York 10022
(212) 752-6830

Attorneys for Witness Subpoenaed before
the Grand Jury

COPY RECEIVED

MEMORANDUM

*motion denied. See minutes
of this date.*

*So ordered
Kunin
10/25*



6/30/77

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X
IN RE THE GRAND JURY :
EMPANELLED October 14, 1976 :

ORDER TO SHOW CAUSE

-----X
Upon the affidavit of Stephen R. Steinberg, sworn to on June 27, 1977, and the exhibits annexed thereto it is hereby

ORDERED, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, that the United States Department of Justice, Antitrust Division, Kenneth C. Anderson, Chief, Special Regulated Industries Section, show cause ^{before the Part I} ~~at a motion~~

CLB
U.S.D.J. } ~~term~~ ^{Judge} of this Court to be held in Room 506, United States Court House, Foley Square, New York, New York on the 30th day of June 1977 at ^{9:45} ~~10:00~~ in the forenoon of that day or as soon thereafter as counsel can be heard why an order should not be made herein requiring the United States Department of Justice to produce, or provide access to, certain materials in its possession (i.e. certain notes and a tape recording) to a witness subpoenaed to appear before the above Grand Jury prior to the appearance of that witness before the Grand Jury because the witness requires these materials to

refresh his recollection; because the witness may be seriously prejudiced if he is not able to refresh his recollection with these materials prior to his appearance and because the United States will suffer no prejudice as a result of such disclosure; and it it further

ORDERED, that the witness shall not be required to appear before the Grand Jury to testify as subpoenaed pending the hearing and determination of this motion; and it is further

ORDERED, that, as stipulated by the United States Department of Justice and counsel for the witness, that stipulation, this motion and all papers, transcripts, orders, etc. relating thereto, with the approval of this Court, be sealed until further order of the Court; and it is further

ORDERED, that ^{person} service of this Order and the papers upon which it is based be made on or before 10:30 o'clock, A.M. June 28, 1977 by delivering copies of said papers to the United States Department of Justice, c/o Robert E. Hauberg, Jr., Assistant Attorney General, 26 Federal Plaza, Room 3630, New York, New York, and that such service be deemed sufficient.

Dated: New York, New York
June 28, 1977

Issued at 10:05 A.M.

s/ Charles L. Bricant
U. S. D. J.

(Part I)

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
In re GRAND JURY EMPANELLED :
October 14, 1976
-----x

AFFIDAVIT

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

STEPHEN R. STEINBERG, being duly sworn, deposes and
says:

1. I am a member of the firm of Reavis & McGrath,
attorneys for a witness who has been subpoenaed to appear
before a Grand Jury empanelled in this district on October 14,
1976. I make this affidavit in support of the motion of that
witness, pursuant to Rule 6(e) of the Federal Rules of Criminal
Procedure, to compel production of, or access to, prior to
his appearance before the Grand Jury, certain materials in
the possession of the Department of Justice (the "Department").

2. The Grand Jury has been conducting an investiga-
tion into possible antitrust violations in the securities
industry. In March 1977, the witness was served with a
subpoena requiring him to appear and testify before the

Grand Jury. By agreement, the witness's date to appear was adjourned to June 27, 1977. On June 17, 1977 I advised the Department that we intended to make a motion for the purpose of obtaining access to the materials. On June 21, 1977 I wrote the Department stating that in view of our intention to file this motion, which could not be decided before June 27, we assumed the June 27 date would be withdrawn. (A copy of that letter is annexed hereto as Exhibit A.) On June 27, 1977 without our being previously advised, the witness was served with another subpoena requiring his appearance before the Grand Jury on June 29, 1977.

3. Both before the witness was served with the first subpoena and afterward the witness and his counsel had been cooperating with the Grand Jury in the course of its investigation. In connection therewith, the witness and I, together with an associate in Reavis & McGrath, Joseph A. Clark III, met with Assistant Attorney General Robert E. Hauberg Jr. at Mr. Hauberg's request in order to provide Mr. Hauberg with an opportunity to speak to and question the witness on an informal basis. At that meeting, Mr. Hauberg asked the witness several questions relating to phone conversations, meetings, etc. to which the witness could not give definitive answers due to a lack of specific recall as to those events.

4. Subsequent to that meeting, Mr. Clark and I have had several telephone conversations with Mr. Hauberg regarding the status of the Grand Jury's investigation in general, and, in particular, certain facts which he had apparently elicited from others in the course of that investigation. We understood that we were being informed of these facts in order that we might use them to attempt to refresh the recollection of the witness in order that he might further assist the Grand Jury's investigation.

5. It was our belief that the information supplied us by Mr. Hauberg was not sufficiently specific to be of real assistance in refreshing the witness's recollection. Consequently, we informed Mr. Hauberg that if we were to accomplish the result desired, we required more specific information about the matters which he had brought to our attention.

6. Mr. Hauberg did inform us of two specific instances of conversations which he claimed the witness had had with certain other individuals. These conversations were said to have occurred approximately one year ago. Mr. Hauberg also informed us that the Department had in its

possession handwritten notes regarding one of these conversations and a tape recording of the other. The notes apparently relate to things which the witness may have said, and the tape recording apparently records the witness's voice among others.

7. We used the sketchy information given to us by the Department in an attempt to refresh the recollection of the witness, but to little avail. We advised Mr. Hauberg of this. Mr. Hauberg indicated, to some extent, some lack of understanding of the witness's failure of recollection. We informed Mr. Hauberg that we believed it would be helpful if we were permitted some access to the tape and notes. We had hoped that, at least, the witness would have been able to listen to the tape and review the notes. Mr. Hauberg stated that he would raise our request with others in the Department of Justice.

8. Subsequently, in late May, 1977, Mr. Hauberg advised us that it was the position of the Department that it would not comply with our request due to the "Grand Jury Secrecy Rule" and because of an "Impoundment Order" regarding materials produced under subpoena in the Grand Jury investigation which was entered by United States District Judge Duffy

at the time the Grand Jury was empanelled. On June 2nd 1977, Mr. Hauberg advised me that the Department "doesn't want" us to have these materials. We had previously asked that the Department reconsider its position. We were subsequently informed that the Department's position had been reconsidered but that the Department declined to change its position. On June 21, 1977, we wrote to the Department setting forth these matters and requesting a response, if there had been any change in the Department's position. (A copy of that letter is annexed hereto as Exhibit B.) The "response" was the service of the second subpoena, returnable on a scant two (2) days notice. The notice appears unreasonable in light of our advise to the Department that we were making this motion.

9. The witness and his counsel have thus far made every reasonable effort to assist the Grand Jury in its investigation, and wish to continue to do so. However, despite considerable effort, the witness's recollection of the particulars of specific events and specific conversations remains imprecise. The Department of Justice has been so informed on several occasions.

10. Mr. Hauberg has informed us that the Department intends to use the notes and the tape herein sought to refresh the witness's recollection when he testifies before

the Grand Jury. Mr. Hauberg noted that should the witness, when confronted with the materials, choose to speak with his counsel he may be excused from the Grand Jury room to confer. We feel it inappropriate to place the witness before the Grand Jury under such circumstances. This procedure is surely not the best method of eliciting the information the Department seeks and can only serve to prejudice the witness before the Grand Jury. It will not be explained to the jurors that the witness has cooperated with the investigation fully and has expended a great deal of effort in trying to recall the particulars of certain events, without much success. All the jurors might see is a witness who cannot recall certain particulars being confronted with, apparently, materials showing he did participate in certain events. To the jurors it might appear that the witness is being evasive or uncooperative or, possibly, they might even suspect or believe he is not telling the truth.

11. Accordingly, we believe that the interests of justice and the interests of the witness require that the materials in the Department's possession be made available to the witness prior to his appearance before the Grand Jury for the purpose of refreshing his recollection in order

that he might further assist the Grand Jury in its investigation without prejudice to himself.

12. The Department has not stated that it would be prejudiced by a delay in the witness's appearance pending a determination of this motion. In a conversation today with Mr. Hauberg, when I asked him how the government would be prejudiced, he responded only that he might want to follow up leads which the witness might give him. I explained to Mr. Hauberg that I found that not to be a reason to rush the Court to a determination of the substantial legal issues, especially in view of the fact that he has been told repeatedly that the witness has no recollection of the events to which Mr. Hauberg claims the tape and notes refer. Thus, there is no prejudice to the government in delaying for a short period the witness's appearance pending an orderly determination of this motion.

13. Mr. Hauberg agreed, as a matter of courtesy, to adjourn the witness's substantive appearance to Thursday, June 30, 1977, because I have to sit as a Special Master in Special Term, Part 1A, Supreme Court, New York County, on June 29, 1977, the present return date of the new subpoena.

However, that gives this Court only a few hours to decide this motion if it is heard Thursday morning. Thus, a stay is, I submit, appropriate.

14. This motion is brought on by order to show cause because a prompt resolution of the issues raised on this motion is necessary, and because an order is required ordering that the witness need not appear before the Grand Jury until a hearing and determination on the motion.

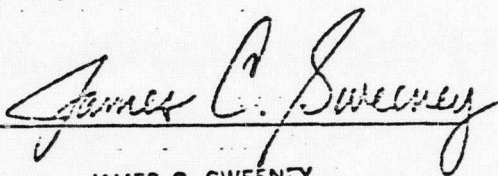
14. No previous application has been made for any of the relief sought herein.



STEPHEN R. STEINBERG

Sworn to before me this

27 day of June, 1977.



JAMES C. SWEENEY
NOTARY PUBLIC, State of New York
No. 31-4625324
Qualified in New York County 1978
Commencement March 30, 1978

Exhibit A

June 21, 1977

Robert E. Hauberg, Jr., Esq.
Antitrust Division
United States Department of Justice
Washington, D.C. 20530

Re: KCA:REH 60-268-31

Peter J. Kellogg Grand Jury Subpoena

Dear Mr. Hauberg:

Your letter of June 14, 1977 was received on June 20 at this office. Its date indicates it was mailed prior to our conversation of last week in which we advised you that we would be making a motion with respect to certain materials which you have previously described to us which we believe are necessary for Mr. Kellogg to have.

Accordingly, since under no circumstances will the matter be resolved prior to June 27, 1977, I assume that as a result of our conversation, the date has been withdrawn.

Very truly yours,

Stephen R. Steinberg

Exhibit B

June 21, 1977

Robert E. Hauberg, Jr.
Attorney
Antitrust Division
United States Department
of Justice
Washington, D. C. 20530

Re: Grand Jury Empanelled October 14, 1976

Dear Mr. Hauberg:

We write with respect to the Grand Jury subpoena served upon our client Peter Kellogg in mid-March, 1977.

In early March, prior to the service of that subpoena, Mr. Kellogg, Mr. Clark and I met with you at your request for the purpose of providing you with an opportunity to speak to and question Mr. Kellogg in an informal setting. As you will also recall, during that meeting you asked Mr. Kellogg several questions with respect to meetings, phone conversations, etc., to which Mr. Kellogg could not give definitive answers because of a lack of specific recall.

Subsequent to that meeting, Mr. Clark and I have had several conversations with you regarding the status of the Grand Jury investigation in general and, in particular, regarding certain facts which you say have been elicited in the investigation and with respect to which you have advised us. As we understand it, you advised us of those facts in order that we might attempt to use such information to refresh Mr. Kellogg's recollection of events, the ultimate purpose being the furtherance of the Grand Jury investigation. We informed you that we believed that if we were to accomplish that result we needed the "specifics" of the matters you were bringing to our attention. Indeed, you

Robert E. Hauberg, Jr., Esq.
Page Two
June 21, 1977

brought to our attention two specific instances of conversations you claim Mr. Kellogg had with certain other individuals. You informed us there existed handwritten notes regarding one of the conversations and a tape recording with respect to the other. The notes apparently relate to things it is claimed Mr. Kellogg said and the tape-recording apparently records Mr. Kellogg's voice among others.

Having been so informed, and having attempted to refresh Mr. Kellogg's recollection, to little avail, we subsequently informed you that we believed it would be worthwhile if we were permitted some access to the tape and notes. We had hoped that, at least, Mr. Kellogg would have been able to listen to the tape and see the notes. Upon our request for access, you informed us that you would take that matter up with others in the Department of Justice. Subsequently, in late May, 1977 you advised us that the position of the Department was that, due to the "Grand Jury Secrecy Rule" and because of an "Inpoundment Order" entered by United States District Judge Duffy regarding materials produced under subpoena in the Grand Jury investigation, the Department would not comply with our request. We asked you to have the Department reconsider its refusal to provide access. Subsequently, you informed us that the matter had been reconsidered and that the position of the Department remained constant.

As you know, and as you have acknowledged, we and our client have made every reasonable attempt to assist the Grand Jury investigation. Mr. Kellogg does not have any recollection of the particulars of specific events and specific conversations which you claim occurred. We have advised you of that in our many conversations. So too, on more than one occasion we have advised you that Mr. Kellogg's ability to recall simply was not geared to the recollection of specific conversations.

With the above in mind and because we think it inappropriate to place Mr. Kellogg before the Grand Jury where, as you have informed us, the Department intends to

Robert E. Hauberg, Jr., Esq.
Page Three
June 21, 1977

use the notes and tape to refresh Mr. Kellogg's recollection, despite its refusal to so refresh beforehand, we informed you on June 17, 1977 that we intended to make a motion for the purpose of obtaining access to the notes and tape. We plan to file that motion early next week. If there has been any change in the Department's position, please communicate with us prior to Friday, June 24, 1977.

Finally, I enclose an original and two copies of of a stipulation with respect to the sealing of the motion papers, etc. If it meets with your approval, please sign and return the original and one copy, keeping a copy for your files. We will see that it is filed with the Court.

Very truly yours,

Stephen R. Steinberg

bcc: Mr. James H. Lynch, Jr.
Spear, Leeds & Kellogg
111 Broadway
New York, New York 10006

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

IN RE THE GRAND JURY :
EMPANELLED OCTOBER 14, 1976 :

-----X

MEMORANDUM OF LAW
IN SUPPORT OF MOTION
TO COMPEL DISCLOSURE

This memorandum is submitted on behalf of a witness who has been subpoenaed to appear before a Grand Jury empanelled in this District on October 14, 1976 (the "Grand Jury"), in support of his motion, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, to compel production of, or access to, prior to appearing before the Grand Jury, certain materials -- not Grand Jury transcripts -- in the possession of the Department of Justice.

FACTS

The facts necessitating this motion are set forth in full in the affidavit of Stephen R. Steinberg, sworn to June 27, 1977. Briefly, those facts are: In March 1977, the witness, a prominent member of a New York Stock Exchange member firm,

was subpoenaed to testify before the Grand Jury in connection with its investigation of possible antitrust violations in the securities industry. Both before he was subpoenaed and subsequent thereto the witness and his counsel (Reavis & McGrath) cooperated fully with the Department of Justice (the "Department") in this investigation and, indeed, have met with an Assistant Attorney General on an informal basis to permit the Department of Justice to speak to and question the witness. (Steinberg affd't. ¶ 3)

During that meeting the witness was questioned concerning meetings, phone conversations and other contacts in which the Department indicated it had reason to believe either the witness participated or had some knowledge of. The witness, however, had little or no specific recall as to those meetings and conversations and that was explained to the Assistant Attorney General. Subsequent to that meeting, Reavis & McGrath had several telephone conversations with the Assistant Attorney General during which counsel was informed of certain matters which the Department advised had been elicited by it. The Department and counsel had hoped that bringing these matters to the attention of the witness would help to refresh his recollection. On several occasions,

counsel and the witness considered these matters. Such time and careful thought was expended for one purpose only -- to assist the Grand Jury investigation. In the course of one of the conversations with the Assistant Attorney General, counsel was informed of two specific conversations in which the witness is claimed to have participated. These conversations were said to have occurred one year ago. Counsel was told generally about the nature of those conversations. Some specifics were provided. The Assistant Attorney General informed Reavis & McGrath that the Department had in its possession a tape of one of these conversations and handwritten notes relating to the other. (Steinberg aff't ¶ 6)

The sketchy information provided to the witness and his counsel proved ineffectual to refresh the recollection of the witness. Counsel advised the Department of this. The Department indicated, to some extent, some lack of understanding at the failure of recollection. Accordingly, in order to use the most effective method available for refreshing the witness's recollection, counsel requested that the Department permit counsel and the witness some access to the tape and notes. The Department agreed to consider the request. Subsequently, however, counsel was informed by the

Department that it would not permit access because of the "Grand Jury Secrecy Rule"* and an "Impoundment Order"** relating to materials produced under subpoena, which order had been entered by the United States District Court Judge who empanelled the Grand Jury. (Steinberg affd't. ¶ 8). A request to reconsider was made. Reconsideration was given but the request was again denied.

The refusal of the Department of Justice to grant access to these materials and the legitimate need of the

* The rule to which the Department had reference finds its statutory embodiment in Rule 6(e) of the Federal Rules of Criminal Procedure, which provides in relevant part:

(e) Secrecy of Proceedings and Disclosure. Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

** We have been informed that the Order itself is not disclosable to us and, accordingly, we cannot speak to it in this memorandum.

witness for some access in connection with his testimony before the Grand Jury necessitates the instant motion.

The witness's need arises as follows: the Department has indicated that while it will not allow use of the materials to refresh his recollection before he testifies, it does intend to use them to refresh his recollection while he is testifying. (Steinberg Affd't ¶ 10). The Department has stated that if the witness, when confronted with the materials, wishes to speak to his counsel he may be excused from the Grand Jury room to confer. Besides the fact that such procedure is not the best way to obtain the truth, we believe that to place the witness before the Grand Jury under these circumstances can only be prejudicial to him. The Grand Jury will not be advised that the witness has fully cooperated with the Department, that for the past several months he has been searching his mind in an attempt to recall certain events with little success. All the jury might see is a witness who cannot recall certain matters being confronted with, apparently, materials that will show he did participate in certain events. In this context, the witness runs the risk that the Grand Jury and possibly the Department will believe the witness is being evasive or

lying -- even if after hearing the tape or seeing the notes he does have additional recall.*

While we are fully aware of the generalization that Grand Jury Proceedings are usually shrouded in secrecy, it is clear that the rule of secrecy is not of unlimited application. Here, we submit that the rule is inapplicable. Because the materials with respect to which some limited access is sought are not "matters occurring before the grand jury" within the meaning of Rule 6(e), the Rule does not apply. And, even if it did apply there exists sufficient cause for the limited access sought.

* Almost identical claims of prejudice were found to be sufficient to permit disclosure to a grand jury witness of grand jury transcripts (which, as demonstrated below, enjoy protection under the Grand Jury secrecy rule not accorded to the documents and materials sought here) in In re Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975). There, two witnesses subpoenaed to appear before a grand jury sought access to their prior testimony before that grand jury in order to prepare adequately for their next appearances before the grand jury, to refresh their recollections and to reduce the possibility of making an inadvertent misstatement that might subject them to subsequent perjury and/or contempt charges. This case is discussed more fully at p. 15, infra.

I

THE MATERIALS IN QUESTION ARE
NOT BARRED FROM DISCLOSURE
UNDER THE RULE OF SECRECY

We submit that the tape and notes in issue here are not barred from disclosure because they are not "matters occurring before the grand jury" within the meaning of Rule 6(e).

This discussion must proceed by emphasizing what we are not seeking. We are not seeking transcripts of the grand jury proceedings. We do not seek to learn what is going on before the Grand Jury. Rather, we seek only access to notes of and a tape of conversations or meetings in which it is claimed that the witness participated. Those materials are sought for their own intrinsic value rather than for anything they might reveal about the proceedings of the Grand Jury. They will reveal nothing of what has occurred before the Grand Jury. In these circumstances, the rule of secrecy does not bar the access we seek. United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960); Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975); Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972); In Re Hearings Before The Committee On

Banking and Currency Of The United States Senate, 19 F.D.R. 410 (N.D. Ill. 1956), vacated on other grounds, 245 F.2d 667 (7th Cir. 1957).

Documents, books and similar materials, because they have a significance apart from the grand jury, are treated differently from grand jury minutes and transcripts for purposes of disclosure under Rule 6(e). Wright, Federal Practice and Procedure: Criminal § 106; United States v. Smith, 22 F.R.D. 482 (N.D. Ill. 1958.) The reason for this sharply different treatment is obvious. As the Second Circuit expressed it in United States v. Interstate Dress Carriers, Inc. 280 F.2d 52 (2d Cir. 1960):

...The Rule is intended only to protect against disclosure of what is said or what takes place in the grand jury room.

Id. at 54.

United States v. Interstate Dress Carriers, Inc., supra, is the leading case holding that documents sought for their own intrinsic value are not within the purview of Rule 6(e). In that case, the Interstate Commerce Commission sought access to the records of Interstate Dress Carriers. Interstate was unable to comply with the I.C.C.'s demand because the records were in the hands of the Justice Department pursuant to a grand jury subpoena. The Justice Depart-

ment therefore applied for leave of the Court to allow the I.C.C. to examine and copy the subpoenaed records. The court of appeals affirmed the district court's determination that these documents could be disclosed, noting:

[W]hen testimony or data is sought for its own sake-- for its intrinsic value in the furtherance of a lawful investigation -- rather than to learn what took place before the grand jury, it is not a valid defense to disclosure that the same information was revealed to a grand jury or that the same documents had been, or were presently being, examined by a grand jury. [cite omitted].

Id. at 54.

The court noted further that the I.C.C.'s investigation would in no way compromise the secrecy of the grand jury since the I.C.C. was not seeking to learn what use the grand jury had made of Interstate's records but merely wished to inspect records which happened to be in the possession of the grand jury. In the court's opinion:

No question of the "disclosure of matters occurring before the grand jury" [was] therefore involved and Rule 6(e) [did] not prohibit the examination.

Id. at 54.

Davis v. Romney, supra, 55 F.R.D. 337 (E.D. Pa. 1972) demonstrates that the principles enunciated in Interstate Dress Carriers, supra, apply as well to private litigants

seeking disclosure of materials before the grand jury. In that case, plaintiff in a civil suit sought disclosure of certain Housing and Urban Development materials. Because the materials sought were in the possession of a grand jury, defendants asserted that they were precluded from disclosing these materials and sought a protective order. The court denied the motion noting that plaintiffs were not seeking to discover what use the grand jury was making of the materials sought or to discover upon whom the grand jury was focusing its attention and for what crimes. They sought only the information contained in the materials, information which "does not reflect upon and is not inextricably intertwined with the deliberation or work of the grand jury." Id. at 341. Since disclosure of the materials would not "expose or reveal what 'occurr[ed]' when the grand jury examined the material" the Court found Rule 6(e) inapplicable.

In reaching its conclusion, the court contrasted the question before it to cases where Rule 6(e) was held applicable, stating:

This is not a situation in which the proponents of disclosure seek transcripts of testimony given before the grand jury....[cites omitted] Nor is it one in which they seek minutes or records of the grand jury....[cites omitted] Nor further is it one in which proponents

seek information gained by the grand jury from a person's records or documents[cite omitted] Nor finally is it one in which they seek "all books, pamphlets, documents, and papers presented to the Grand Jury," ... [cite omitted] or "a list of the documents...to be inspected by the Grand Jury." [cite omitted] In each of the cases cited above, the proponents sought to inquire into the grand jury's work either by examining its transcripts, records, or minutes or by ascertaining what specific documents passed before it. Disclosure would in those cases suggest some specific act, thought, or focus of the grand jury, hence the application of Rule 6(e) by the courts.

Id. at 342.

A similar situation was presented in Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975), where plaintiff sought certain documents from the defendant who refused to produce them on the ground that they were in the possession of the United States Attorney in connection with a grand jury investigation. Plaintiff moved for leave to examine and copy the records and the Government opposed the motion arguing that disclosure would violate the secrecy of the grand jury.

The Government's position was rejected, the Court noting that:

plaintiff's request seeks these documents for their own intrinsic value; not to discover what has transpired before the grand jury.

Id. at 931. The court also quoted from United States v. Interstate Dress Carriers, Inc., supra, to the effect that disclosure of documents does not constitute disclosure of matters occurring before the grand jury.

What is sought here is limited access to two specific items. They are sought for their own intrinsic value and not to discover what is taking place before the grand jury. The witness wants these materials solely for their own value, for use in refreshing his recollection so that he might better assist the Grand Jury in its effort to discover the truth about the matters under investigation. Further, disclosure in the normal sense of the word is not even sought here. All we request is some access to the materials. The opportunity to listen to the tape and see the notes, with the Department of Justice present, is all that is sought on this motion. Under these circumstances, where the tape and notes are not "matters occurring before the grand jury", the relief requested should be granted.

II

EVEN IF THESE MATERIALS WERE WITHIN
THE SCOPE OF RULE 6(e), A PARTICULAR-
IZED NEED SUFFICIENT TO WARRANT
DISCLOSURE EXISTS

Even were we to assume that the tape and notes in question could be considered as coming within the purview of Rule 6(e), limited access should still be granted because there is a particularized need for such access sufficient to overcome the policy of grand jury secrecy.

Despite its sweeping language, Rule 6(e) has not been interpreted as precluding disclosure of all matters "occurring before the Grand Jury". Disclosure of matters occurring before the Grand Jury may be had if the party seeking such disclosure can show a "particularized need" for the materials. Dennis v. United States, 384 U.S. 855 (1966); Pittsburg Plate Glass Co. v. United States, 360 U.S. 395 (1959); Smith v. United States, 423 U.S. 1303 (Douglas, Circuit Judge, 1975); Melton v. United States, 398 F.2d 321 (10th Cir. 1968).

The scope of Rule 6(e) has been interpreted largely in connection with requests for disclosure of either transcripts of testimony before the grand jury or minutes of the proceedings of the grand jury. Dennis v. United States, 384

U.S. 855 (1966); Pittsburg Plate Glass Co. v. United States, 360 U.S. 395 (1959); United States v. Procter & Gamble Co., 356 U.S. 677 (1958). Such cases go to the essence of the problem to which Rule 6(e) was addressed because transcripts and minutes obviously reveal the actual proceedings of the grand jury, which is precisely what the rule of secrecy is intended to circumscribe. See United States v. Interstate Dress Carriers, Inc., supra, at 54.

In contrast, disclosure of documents which pre-date the existence of the Grand Jury, produced in connection with a grand jury investigation, will not reveal the actual proceedings of the grand jury. Thus, while we cite and discuss cases which deal with requests for access to transcripts and minutes, we note that the context in which this motion arises is far different from the question before the courts in those cases. Accordingly, the particularized need sufficient to overcome the policy of secrecy in cases involving documents and similar materials should not have to be nearly as compelling as that required to outweigh the policy of secrecy in cases involving transcripts.

In any event, the need which is present here has been held sufficient to require disclosures of grand jury

transcripts. In In re Braniff Airways, Inc., 390 F.Supp. 344 (W.D. Tex. 1975) it was held that the desire of a witness before a grand jury to obtain access to his prior grand jury testimony in order to prepare himself to testify again and in order to refresh his recollection and to alleviate the possibility of inadvertent misstatement which might lead to perjury charges was a sufficient particularized need to outweigh the policy of grand jury secrecy. Two witnesses who had been subpoenaed and had testified twice before the grand jury were subpoenaed to testify a third time about the same transactions. In preparing to testify the third time, both witnesses sought access to the transcripts of their earlier testimony for the reasons stated above. The government opposed the motion. The court held that the movants had met the burden of showing a particularized need for the transcripts outweighing the policy of secrecy:

Under the peculiar circumstances of this case, this Court believes that fundamental fairness, as well as the administration of justice, require that each of the witnesses, McCauly and Sicard, be allowed a reasonable opportunity to review the transcript of his own testimony prior to his appearance before the grand jury, but that, in order to eliminate the possibility of a conflict of interest no attorney for

the witness or the government should be permitted to remain in the room where the review is taking place.

Id. at 347. In addition, the court noted that the grand jury's interest in ascertaining the truth would be best served by allowing the disclosure sought.

The instant motion presents a far more compelling case for disclosure of the materials sought than did the Braniff case. The same reasons which warranted disclosure of the transcripts in that case are present in this case (i.e. the witness's need to refresh his recollection to protect himself against inadvertent misstatement), yet, here we do not seek such grand jury transcripts.

Thus we submit that "fundamental fairness, as well as the administration of justice" (390 F.Supp. at 347) require that the witness here be granted some limited access to the materials in question.

CONCLUSION

Accordingly, we respectfully request that the Court enter an order directing the Department of Justice to permit the witness to examine the tape and notes in the possession of the Department of Justice which relate to two

conferences in which the witness allegedly took part in the summer of 1976, and permitting the witness to make copies thereof, subject to the restriction that these materials and the contents thereof be disclosed only to the witness and his attorneys.

Respectfully submitted,

REAVIS & McGRATH

By Stephen R. Steinberg
A Member of The Firm

345 Park Avenue
New York, New York 10022
(212) 752-6830

Attorneys for Witness
Subpoenaed before the
Grand Jury

Of Counsel:

Stephen R. Steinberg
Joseph A. Clark, III

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 IN RE: THE GRAND JURY :

6 EMPANELED OCTOBER 14, 1976 :

7 -----x

8
9 Before:

10 HON. CHARLES L. BRIEANT,

District Judge.

11
12
13 New York, June 28, 1977;
14 10.00 o'clock a.m.

15
16 APPEARANCES:

17 ROBERT E. HAUBERG, JR., Esq.,
Department of Justice.

18
19 REAVIS & McGRATH, Esqs.,
Attorneys for Witness;

20 BY: JOSEPH CLARK, Esq.,
Of Counsel.

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2 THE COURT: Is there anyone who wants to be
3 heard in this matter?

4 MR. CLARK: Joseph Clark, your Honor. I am
5 with the firm of Reavis & McGrath. We represent the
6 witness in this matter.

7 Briefly, your Honor, several months ago the
8 witness was subpoenaed by the Department of Justice.
9 Since that time, your Honor, we have been in constant
10 contact with the Department discussing various facets of
11 the investigation, the Department giving us small bits of
12 information to see if we could refresh the recollection
13 of the witness whom we represent.

14 THE COURT: Is your witness a target?

15 MR. CLARK: I don't believe so, your Honor.

16 THE WITNESS: Is the witness a target?

17 MR. HAUBERG: Robert Hauberg, Antitrust Division,
18 Department of Justice.

19 Your Honor, the witness has been considered by
20 our office to be a possible target. We have initiated
21 proceedings to obtain, if he does testify, an immunity
22 order in light of his particular position.

23 I have advised counsel that they should consider
24 him in that position.

25 THE COURT: If you are going to give him an

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2 immunity order, why don't you have an informal meeting
3 and give him whatever documentation he needs to testify.
4 If you are not going to give an immunity order, I have to
5 assume that unless the fellow is daft, he is going to take
6 the Fifth. So why are we going through all this non-
7 sense?

8 MR. HAUBERG: Your Honor, for two reasons.
9 The Department feels that it is unable to provide prior to
10 his appearance before the grand jury specific documents --

11 THE COURT: Let's assume he goes in and takes
12 the Fifth, which I assume he will do if he is a target.
13 Assume further you give him use immunity.

14 Based on those two assumptions, from that time
15 on he's on your side, he is helping you and his testimony
16 is totally useless if he sits in the grand jury and says
17 I think such and such, and it turns out to be incorrect
18 or mistaken, and then some criminal defendant gets access
19 to that testimony as 3500 material on a trial and cross-
20 examines this witness on a trial and says that isn't what
21 you told the grand jury, is it, Mr. Witness?

22 Where is the point? Why don't you get a
23 little practicality on this thing.

24 MR. HAUBERG: There are two reasons, your Honor,
25 why we think that the witness cannot have access to it

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2 prior to his actually appearing within the grand jury.
3 First of all, the documents in question here were
4 produced by not this particular witness, they were not
5 generated by the Government, they were produced by a third
6 party, who is under the protection of Rule 6(e) in terms
7 of his particular materials, his particular testimony and
8 also under the protection of the impanelment order as
9 originally entered in this investigation by the impaneling
10 judge.

11 Secondly, the witness in appearing before the
12 grand jury would have access to these materials and a
13 chance to review them. He would have the opportunity to
14 consult, in fact, with counsel if he had any question
15 about the materials and to state the extent of his knowl-
16 edge about the matters covered in the materials.

17 That particular position we believe, your
18 Honor, satisfies both the grand jury secrecy and impanel-
19 ment order strictures which pertain to this case.

20 THE COURT: The difficulty with it is, it seems
21 to me that the witness is entitled to litigate it. I am
22 only here this morning for purposes of entertaining his
23 application for an order to show cause.

24 It also seems to me that both of you can be
25 sensible on this thing.

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2 MR. CLARK: May I make a few comments, your
3 Honor?

4 THE COURT: You can. Isn't your application
5 mooted until such time as he is actually granted use
6 immunity and it actually becomes apparent that he is going
7 to testify? It seems to me this is an exercise in
8 futility.

9 MR. CLARK: Your Honor, he will be testifying
10 pursuant to a new subpoena issued yesterday.

11 THE COURT: Yes.

12 MR. CLARK: He will be appearing on Wednesday.

13 THE COURT: To take the Fifth.

14 MR. CLARK: And back on Thursday.

15 We would like to get a ruling from the Court
16 before he does that, your Honor. We are afraid of the
17 prejudice that this witness will suffer when before the
18 grand jury he says, I want to leave because I have to talk
19 with counsel. If he gets use immunity, that's one thing.
20 That doesn't protect him from perjury.

21 Were our witness going before the grand jury
22 in this posture, I see extreme prejudice.

23 THE COURT: Where is the prejudice?

24 MR. CLARK: We cite a case in our brief that
25 recognized this kind of prejudice, page 6 of --

1 gws

2 THE COURT: You are entitled to have your
3 motion heard by the Part I judge. I will sign your order.
4 I think both of you ought to be sensible.

5 I wonder whether this isn't premature until he
6 takes the Fifth and gets the use immunity. Why isn't
7 it premature?

8 MR. CLARK: Ten minutes later the Government
9 is going to have him back before the grand jury.

10 THE COURT: They have to go to Washington.

11 MR. CLARK: They have the order already.

12 MR. HAUBERG: The order has been signed.

13 THE COURT: Giving him use immunity?

14 MR. HAUBERG: That is correct.

15 THE COURT: You have to have it heard on the
16 30th?

17 MR. CLARK: No, your Honor. We asked the
18 Government if we could put that off.

19 THE COURT: That is a side show day in
20 Part I. That's where all the arraignments are held.
21 Why don't you make it on the 1st.

22 MR. HAUBERG: The problem that we face is this,
23 your Honor, and that is the 30th is the last day for a
24 long period of time in which the grand jury will be avail-
25 able to hear the witness.

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2 THE COURT: Are you expecting that the Court
3 is going to decide it from the bench?

4 MR. HAUBERG: Your Honor, we think that the
5 precedent is clear in this particular Circuit as to whether
6 the Government is compelled to disclose to a witness, be it
7 a target or non-target in an investigation, all the
8 evidence and materials before the grand jury as it
9 pertains to that witness.

10 I think based on that particular line of
11 cases, including the Deltoro case, your Honor --

12 THE COURT: The whole thing is silly. Either
13 you are going to use the fellow as a fruitful witness,
14 in which case you have to get his recollection refreshed,
15 or you are going to treat him as a target. People who
16 gets use immunity ought to realize it's pretty much
17 impractical to prosecute.

18 When are you going to be able to serve the
19 order?

20 MR. CLARK: It's been served, your Honor.

21 MR. HAUBERG: I have received a copy.

22 THE COURT: Has it been served?

23 MR. CLARK: Yes.

24 THE COURT: Did I sign it? How do you serve
25 something before it's signed?

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2 MR. CLARK: I handed it to counsel.

3 THE COURT: All right.

4 It's ordered that this transcript be sealed.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE GRAND JURY :
EMPANELLED OCTOBER 14, 1976 :

AFFIDAVIT

- - - - - x

STATE OF NEW YORK)
COUNTY OF NEW YORK) SS.:

ROBERT E. HAUBERG, JR., being duly sworn, deposes and
says:

1. I am an attorney for the Antitrust Division, Department of Justice. I make this affidavit in opposition to the motion of a witness, subpoenaed to testify before the grand jury, to compel disclosure to him, prior to his appearance, of documents in the possession of the grand jury.

2. On October 14, 1976, a grand jury was empanelled to investigate possible antitrust violations in the securities industry. On October 15, 1976, the Court signed an Impounding and Transfer Order.

3. The documents referred to in the witness' motion are of two types. There are notes of a conversation on June 3, 1976, between the witness and a second person, recorded after the conversation by a Government attorney during an interview of the second person. These notes remained in the Government's possession. Notes of a conversation between the witness and the second person on June 28, 1976, were made by the second person. There

is also a tape recording of another conversation on June 11, 1976, among the witness, the second person and one other person. The conversation was recorded by the second person. The tape recording has been transcribed.

4. On December 14, 1976, pursuant to poena duces tecum, the tape recording and notes were produced before the grand jury by the second person participating in the conversations. This person has also testified before the grand jury about the conversations. Neither this person nor the Government has consented to the witness' access to the documents sought.

5. On March 2, 1977, I interviewed the witness. The witness claimed not to recall details of several conversations, including but not limited to the ones referred to in paragraph 2 herein.

6. The witness was personally served with a subpoena to testify before the grand jury on March 22, 1977. Because of conflicting travel plans, the witness requested that his appearance be postponed. I agreed to his request and, after conversations with the witness' counsel, set April 12, 1977, as the date for his appearance. I sent a letter to counsel confirming this date.

7. On April 4, 1977, the witness' counsel requested postponement of the witness' appearance in order to investigate the matter further. I mentioned another conversation the witness may have had. I suggested April 27, 1977, as a new date. Counsel said that he would confirm that date by April 21 or 22, 1977.

8. On April 19, 1977, counsel said that the witness claimed not to recall contents of the conversations. I informed counsel that the tape recording of one of the conversations existed and there were notes relating to other conversations.

9. On April 25, 1977, counsel requested a postponement of the witness' appearance because his investigation was not complete. I agreed to reschedule the witness during the week of May 9, 1977.

10. On May 5, 1977, counsel requested another postponement. I agreed to reschedule the witness during the week of May 16, 1977.

11. On May 13, 1977, counsel requested a postponement because counsel would be tied up on other matters during the week of May 16, 1977 and because the witness had been unavailable to him. Counsel and I agreed to set the witness' appearance for the week of June 6, 1977. Counsel asked to hear the tape recording or to see a transcript. I told him I would ask other officials of the Department of Justice about his request.

12. On May 31, 1977, I told counsel that the witness would be scheduled for June 9, 1977. I also told him that F.R. Cr. P. 6 (e) and the impoundment order prohibited the witness' seeing the requested documents outside of the grand jury. I also stated that the Government preferred to speak to the witness again only under oath before the grand jury.

13. On June 1, 1977, counsel renewed his request to hear the tape recording and to see any transcript. I reiterated the

Government's position. Counsel said that he would research the issue before permitting the witness to testify. I told counsel that the Government might seek use immunity for the witness. I agreed to consult again with my superiors.

14. On June 3, 1977, I told counsel that the witness was still scheduled for June 9, 1977, and that the Government's position on access to the tape recording and any transcript had not changed. Counsel stated that the witness had been unavailable, that there was still preparation to be done, and that counsel had conflicting commitments, including an appearance before another agency and the filing of papers in a lawsuit. I suggested as a final time frame for the witness' appearance June 23, 24, 27, or 28, 1977.

15. On June 14, 1977, counsel confirmed the date of June 27, 1977, for the witness' appearance. I sent a letter to counsel, with a copy to the witness, specifying that date and the time and location.

16. On June 17, 1977, counsel informed me that he would be filing a motion on behalf of the witness to obtain access to the tape recording and any transcript.

17. On June 21, 1977, counsel told me that he had mailed a letter which, inter alia, requested postponement of the witness' appearance. I said I probably could not compel him to appear.

18. The witness did not appear by my consent on June 27, 1977. The last day of the grand jury session was scheduled for June 30, 1977, after which a quorum of grand jurors would not be available throughout July and August 1977. On June 27, 1977, a new subpoena

was served on the witness to compel his appearance before the grand jury on June 29, 1977. By order of the court on June 28, 1977, the testimony of the witness has been postponed until resolution of the witness' motion to compel disclosure, filed June 28, 1977.

19. For over three months the witness has delayed his appearance. Further delay of the witness' testimony until a quorum of the grand jury can reconvene will hinder the investigation. First, the witness could then claim diminished recollection. Second, investigative leads he might provide could grow stale if not pursued while the grand jury was not in session. Third, delay, especially with access to the documents sought, could tempt the witness to conform or to limit his testimony.

Robert E. Hauberg, Jr.
ROBERT E. HAUBERG, JR.

Sworn to before me
this 29 day of June, 1977.

151 Edwin Weiss
Notary Public

EDWIN WEISS
Notary Public, State of New York
No. 60 95-0025
City of New York, Westchester County
Commission Expires March 15, 1979

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -X
: IN RE :
: :
: GRAND JURY EMPANELLED :
: :
: OCTOBER 14, 1976 :
: :
----- -X

MEMORANDUM OF LAW
IN OPPOSITION TO MOTION
TO COMPEL DISCLOSURE

KENNETH C. ANDERSON
Chief, Special Regulated
Industries Section
Antitrust Division
Department of Justice

ROBERT E. HAUBERG, JR.
PATRICIA J. BERELSON
STEVEN J. GORDON
Attorneys
Antitrust Division
Department of Justice

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----- -x
: IN RE :
: GRAND JURY EMPANELLED :
: OCTOBER 14, 1976 :
: ----- -x

MEMORANDUM IN OPPOSITION
TO MOTION TO COMPEL DISCLOSURE

PRELIMINARY STATEMENT

An antitrust grand jury in March 1977 issued and obtained service of a subpoena ad testificandum for the witness who brings this motion ("movant"). At the request of movant, his appearance was adjourned from March 22, 1977, to a date to be arranged. Subsequently, counsel for movant and for the Government set for movant's appearance various dates which were continued at the request of movant and with the consent of the Government. In early June 1977 a date of June 27, 1977, was agreed upon. Upon receipt of counsel's letter of June 21, 1977, that date was withdrawn. The grand jury issued and obtained service of a new subpoena ad testificandum calling for movant's appearance on June 29, 1977. By consent of the parties and order of the court entered June 28, 1977, movant shall not be required to appear to testify pending the hearing and determination of this motion.

Prior to his appearance movant seeks to compel disclosure to him for examination and copying of a tape recording and notes* produced by another witness under a subpoena duces tecum.

The Government urges that the motion be denied.

I

DISCLOSURE IS BARRED BY
F.R.CR.P. 6(e) AND BY
AN IMPOUNDMENT ORDER

Movant contends that disclosure to him of the documents produced under subpoena by another witness is not barred by F.R.Cr.P. 6(e).** Not only does Rule 6(e) bar disclosure but also the Impounding and Transfer Order issued by the empanelling court on October 15, 1976, forbids it:

*Some notes to which movant refers were not made by the witness who produced under subpoena the tape recording of a June 11, 1976, conversation with movant. They were made by a Government attorney who wrote down on June 14, 1976, the witness' account of the first conversation with movant on June 3, 1976. These notes, the Government contends, are not subject to disclosure, if at all, until the prerequisites of the Jencks Act, 18 U.S.C. § 3500 have been met.

**Rule 6(e) provides in pertinent part:

(e) Secrecy of Proceedings and Disclosure.
Disclosure of matters occurring before the grand jury other than its deliberations and the vote of any juror may be made to the attorneys for the government for use in the performance of their duties. Otherwise a juror, attorney, interpreter, stenographer, operator of a recording device, or any typist who transcribes recorded testimony may disclose matters occurring before the grand jury only when so directed by the court preliminarily to or in connection with a judicial proceeding or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

IT IS FURTHER ORDERED that, upon making suitable arrangements with the attorneys of the Antitrust Division assigned to the matter, any person who has produced any of the documents impounded hereunder may have reasonable access, for inspection and copying, to the documents which he has produced. Such person, however, shall not have access to any other documents.*

The cases cited by movant are inapposite. They involve, first, access to grand jury documents by other government agencies or, second, disclosure to persons in other judicial proceedings who were not witnesses in an ongoing grand jury investigation.

In United States v. Interstate Dress Carriers, Inc., 280 F.2d 52 (2d Cir. 1960), the Court held only that a government agency, with independent statutory authority to examine records, could have access to the records of a company who had already produced them to a grand jury. In addition, both the agency desiring to see the records and the Department of Justice agreed to seek a court order to permit the inspection. As in In The Matter Of Hearings Before The Committee On Banking And Currency Of The United States Senate, 19 F.R.D. 410 (N.D. Ill. 1956), vacated on other grounds, 245 F.2d 667 (7th Cir. 1957), the Government thus did not object that access to the subpoenaed documents would interfere with the grand jury investigation. Here movant is a

*Because the instant motion papers are under seal by order of the court on June 28, 1977, the Government can now cite the relevant provision of the order, which itself is under seal by order of the original empanelling court.

person acting under no statutory authority. Furthermore, the Government contends that movant's opportunity to tailor his testimony to the documents would hamper the grand jury investigation.

Second, cases such as Capitol Indemnity Corp. v. First Minnesota Construction Co., 405 F. Supp. 929 (D. Mass. 1975), and Davis v. Romney, 55 F.R.D. 337 (E.D. Pa. 1972), grant access only to parties involved in a civil case, which parties were neither targets nor witnesses before the grand jury. Here movant is a grand jury witness and has knowledge that he is a possible target of the investigation. Moreover, in United States v. Smith, 22 F.R.D. 482 (N.D. Ill. 1958), civil plaintiffs alleged that the grand jury subpoena for documents they sought was a ruse and an abuse of process. Movant makes no similar allegation here.

Movant is not an authorized Government agent or a civil litigant. He is a witness and possible target before the grand jury. He has offered no authority for invading grand jury secrecy under F.R.Cr.P. 6(e) and the impoundment order.

II

A "PARTICULARIZED NEED" STANDARD FOR DISCLOSURE IS INAPPROPRIATE IN ONGOING GRAND JURY PROCEEDINGS

Movant contends that he has a particularized need sufficient to warrant disclosure. The Government submits that the standard

of particularized or compelling need is inappropriate where the grand jury investigation is still in progress.

Even after the conclusion of a grand jury investigation, the "indispensable secrecy of grand jury proceedings," formalized in F.R.Cr.P. 6(e), must be maintained except where there is a compelling necessity, shown with particularity. United States v. Proctor & Gamble Co., 356 U.S. 677 (1958). Among the policy reasons for secrecy noted by the Court were "to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it" and "to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes." Id. at 681 n. 6. Commentators have concluded that these are "[c]ompelling reasons, well tested by time." 1 Wright, Federal Practice and Procedure § 106 at 170 (1969).

As to the first of these reasons, a grand jury is a means of uncovering the truth without the fine tuning of witnesses for trial or other more formal proceedings. Representations by counsel of a witness' current recollection are no substitute for testing his memory under oath in the grand jury and without the opportunity purposefully to limit or conform his testimony to what is already known to the grand jury. The mere presence of physical or documentary evidence in the grand jury room may be persuasive in jogging the witness' recollection. See United States v. Del Toro,

513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975). The witness' only obligation is to tell the whole truth. Secrecy of grand jury testimony and documents of other parties removes any temptation for the witness to play loose with this obligation. This purpose of Rule 6(e) renders inappropriate the application of a "particularized need" standard to movant as a witness in an ongoing investigation.

As to the second of these several reasons, both Rule 6(e) and the impounding order work to assure witnesses that their testimony and documents will not be available to other witnesses outside of the grand jury room. The producer of the tape recording here has the right of protection except for whatever use specifically takes place before the grand jury. The producer has not consented to any waiver of either Rule 6(e) or the impounding order.

Strictures also apply to disclosure of documents obtained in civil antitrust investigations. Under the Antitrust Court Process Act no document, transcript, or answers to interrogatories may be examined by anyone outside of the Department of Justice, except Congress and its committees, without the consent of the person or firm producing the documents. 15 U.S.C. § 1313 (a)(3). When a criminal investigation is pending, the protective purpose of grand jury secrecy should match if not exceed the protective purpose of restraints on disclosure in civil cases. Furthermore, if one witness' right to the secrecy of his documents can be overridden merely by another witness' purported need to examine them in order to prepare for his testimony, the integrity of the grand jury could be seriously jeopardized. Thereafter, every witness could make the same argument of "need."

All but one of movant's cited cases on particularized need* apply to closed grand jury investigations, not to ongoing proceedings. Moreover, the seekers of the grand jury transcripts or documents were not themselves grand jury witnesses. The Government submits that the overwhelming weight of authority limits the "particularized-need" exception to closed investigations.

III

MOVANT HAS SHOWN NO PARTICULARIZED NEED

Movant contends that he requires access to the documents to refresh his recollection and, thus, protect himself against

*The exception is In re Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975), discussed infra.

"inadvertant misstatement." The Government submits that movant's^{58a} reason is no different from the concern of any grand jury witness and does not constitute a particularized need sufficient to compel disclosure. In re Braniff Airways, Inc., 390 F. Supp. 344 (W.D. Tex. 1975), deals only with supplying witnesses with their prior sworn testimony before the same grand jury investigation. The Court does not address itself to disclosing testimony given by a subpoenaed third party. The court was particularly concerned, too, with the repetitive nature of the questioning of witnesses already "exhaustive examined." Id. at 344. Unlike the witnesses in Braniff, movant here has not yet appeared before the grand jury and has not testified under oath. Movant is not attempting to review his own sworn testimony. Furthermore, the events here in question occurred approximately one year ago. The testimony that was reviewed in Braniff took place four to eight years prior to the review. In addition, as Justice Douglas in Smith v. United States, 423 U.S. 1303, 1304 (1975), notes, in staying access by a state prosecutor to federal grand jury records, it is doubtful that the fact that "the materials will be generally useful in refreshing the memories of witnesses" is sufficient under the "compelling necessity" standard of Rule 6(e).

In this Circuit it is clear that a witness, whether a target or not, has no right to be informed of matters, testimony, or documents which may be used against him in the grand jury. In a perjury prosecution, it was held that a prospective defendant may be examined without his knowledge that there are tape recordings

of his bribery conversations. United States v. Del Toro, 513 F.2d 656 (2d Cir.), cert. denied, 423 U.S. 826 (1975). In Del Toro, the court stated:

There is no duty on the prosecutor to tell a Grand Jury witness what evidence it has against him or to give him repetitive warnings that it is his duty to tell the truth when he has sworn upon his oath to tell the truth. It is not an unfair dilemma to put upon a prospective defendant to require him to claim privilege or to tell the truth.

513 F.2d at 664.*

Any person testifying before the grand jury must tell the truth. Even an unimmunized target may not claim that the unfairness of either incriminating himself or committing perjury condones the perjury. United States v. Wong, __ U.S. __ (May 23, 1977), slip op. at 4. Even less persuasive therefore is movant's claim of an unfair dilemma. As an immunizable witness, he has no dilemma at all. He has no compulsion to perjure himself and need only truthfully recall for the grand jury to the full extent of his knowledge.

Movant has shown no reason why his situation should be treated any differently from that faced by any grand jury witness. Even assuming that the particularized need standard applies to an ongoing investigation, movant has failed to show a compelling need.

*A motion similar to movant's, brought by a bribery defendant prior to a grand jury appearance to compel disclosure of video tapes, was denied orally by the Chief Judge of the United States District Court for the District of Columbia. United States v. Robinson, Cr. No. 76-296 (D.D.C.) (Jones, C.J.).

CONCLUSION

For the foregoing reasons, the motion to compel disclosure should be granted.

Dated: New York, New York
June 29, 1977

KENNETH C. ANDERSON
Chief, Special Regulated Industries
Section
Antitrust Division
Department of Justice

Respectfully submitted,

Robert E. Hauberg, Jr.
ROBERT E. HAUBERG, JR.

Patricia D. Berelson/REH
PATRICIA J. BERELSON

Steven L. Gordon/REH
STEVEN L. GORDON

Attorneys, Antitrust Division
Department of Justice

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
IN RE GRAND JURY : AFFIDAVIT
EMPANELLED October 14, 1976 :
-----x

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

JOSEPH A. CLARK III, being duly sworn, deposes and
says:

1. I am an associate in the firm of Reavis & McGrath, attorneys for a witness who has been subpoenaed to appear before a Grand Jury empanelled in this District on October 14, 1976. I submit this affidavit in further support of the motion of that witness, pursuant to Rule 6(e) of the Federal Rules of Criminal Procedure, to compel production of, or access to, prior to his appearance before the Grand Jury, certain materials in the possession of the Department of Justice (the "Department"), which are necessary to refresh the witness recollection.

2. The facts and circumstances necessitating this motion are fully explained in the affidavit of Stephen R. Steinberg, sworn to on June 27, 1977 and previously submitted in support of this motion. This affidavit supplements that affidavit.

3. As explained in the Steinberg affidavit (13-7) the subpoenaed witness and his counsel have been cooperating for some time with the Department in the Grand Jury investigation.

4. I have been informed by Mr. Steinberg that on June 27, 1977 Mr. Robert E. Hauberg, Jr., the Department attorney with whom we have been communicating about this matter, told Mr. Steinberg that an order granting immunity had been obtained. On June 28, 1977, while appearing before Judge Brieant with respect to the Order to Show Cause which brought on this motion, Mr. Hauberg again noted that immunity for the witness had been obtained.

5. I also note that aside from claiming that the rule of Grand Jury secrecy and an Impoundment Order* preclude providing the access we require, the Department had not, until the serving of Mr. Hauberg's affidavit, sworn to on June 29, 1977, offered any practical

* We address the "Rule of Secrecy" in our memoranda. As to the Impoundment Order which, with the service of the Department's memorandum (p. 2-3), we are now able to offer some limited comment on, we do not read it as prohibiting the Department from providing the access sought herein. The portion of the Order cited permits subpoenaed parties access to their own documents and states that "[s]uch person...shall not have access to any other documents." Without quibbling about whether the "access" sought here is the same type of "access" spoken of in the Order, we note that nowhere does the Order state that the Department is prohibited from doing anything. Surely, if the Department chose to use these materials "in the performance of their duties" under Rule 6(e) (see Witness's Reply Memorandum p. 2) it would not argue the Impoundment Order barred such authorized activity. Finally, we note further that "[s]ome notes [which are sought] were not made by the witness who produced [materials] under subpoena...." (Department Memorandum p. 2)

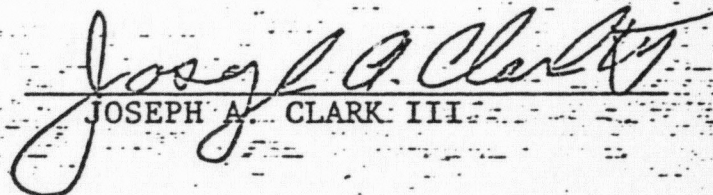
reason (e.g., prejudice to the investigation) why the witness should not be permitted access to the materials. Indeed, the Department has indicated that it seeks to use this cooperative witness to provide further leads for the Department to investigate. Surely, then, the best way to accomplish its goal is to provide an adequate, non-prejudicial opportunity to refresh the recollection of the witness.

6. The reference above to the Hauberg affidavit is to his assertions of prejudice (see ¶19 thereof). Those claims, essentially, have to do with prejudice which might occur if the witness's appearance were delayed. Only in passing does Mr. Hauberg address the key issue, viz., whether that there might be some prejudice arising from the access which is herein sought. Mr. Hauberg's suspicion that the witness might be "tempted" to conform or limit his testimony is just that--suspicion. Moreover, that argument seems contradictory to us. It is the Department who has indicated it intends to use these materials before the Grand Jury, to refresh the recollection of a cooperative, immunized witness for the purpose of advancing the Grand Jury investigation. Thus, the only issue seems to be the timing of the access to the materials. If, indeed, the Department is interested in "leads" (Hauberg affidavit ¶19), what better way to advance that goal than to insure that it is getting the benefit of a fully and fairly refreshed recollection.

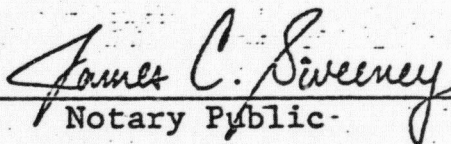
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7. With this matter in this posture (i.e., immunity about to be conferred upon a witness who has been cooperating with the Department and from whom the Department no doubt seeks to elicit as much and as accurate information as possible) we cannot fathom the logic of denying this cooperative witness access, prior to his appearance before the Grand Jury, to the materials sought on this motion.

8. For these reasons and the reasons set forth in the Steinberg affidavit, we believe that the better, more efficient procedure would be to provide the access sought by the witness. Such access will better serve the ends of justice without prejudicing the witness.


JOSEPH A. CLARK III

Sworn to before me this
29th day of June, 1977.


Notary Public

JAMES C. SWEENEY
NOTARY PUBLIC, State of New York
No. 31-4625324
Qualified in New York County
Commission Expires March 30, 1978

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----X

IN RE THE GRAND JURY EMPANELLED :
OCTOBER 14, 1976

:
-----X

REPLY MEMORANDUM
IN SUPPORT OF MOTION
TO COMPEL DISCLOSURE

REAVIS & McGRATH
345 PARK AVENUE
NEW YORK, N. Y. 10022

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

-----x
IN RE GRAND JURY :
EMPANELLED October 14, 1976 :
-----x

MOVANT'S REPLY
MEMORANDUM

I

NO PREJUDICE TO AN ONGOING
INVESTIGATION HAS BEEN SHOWN;
THE DEPARTMENT DOES NOT DENY
THAT THE WITNESS WILL BE PRE-
JUDICED; THE DEPARTMENT IS PER-
MITTED TO REFRESH THE RECOLLECTION
OF THE WITNESS; THE WITNESS DOES
NOT SEEK TO ENCROACH ON GRAND
JURY SECRECY

The Department's papers in reply do not indicate, other than in passing, how the Grand Jury's work would be prejudiced by disclosure to a cooperative witness of the materials sought. Nor does the Department deny that the immunized witness will be prejudiced if he is subject to the type of grandstanding envisioned here. Most important, the Department, sub silentio, concedes that the materials sought do not invade the secrecy of what actually occurs in the grand jury room and the Department concedes that the witness does not seek to find out what the Grand Jury is doing. The Department's argument in essence, that all documents produced under a grand jury subpoena (and even documents that are not, as here) are secret, is simply wrong, as we have shown in our main Memorandum.

Thus, in view of the fact that no real prejudice is shown, and the fact that under Rule 6(e) the Department is authorized to use materials such as those sought here "in the performance of their duties" -- which includes refreshing the recollection of witnesses -- it is strange indeed that the Government is taking the position it takes and seeking to prejudice the witness.

In United States v. American Radiator & Standard Sanitary Corporation 45 F.R.D. 477 (W.D. Pa. 1968) a motion to enjoin the Government from disclosing grand jury testimony to a prospective witness was denied; the Court stating:

"Rule 6(e) expressly provides that attorneys for the United States may use grand jury material in the performance of their duties."

"Interviewing prospective Government witnesses and reviewing their testimony with them is an appropriate part of the duties of an attorney for the United States."
(Emphasis added)

And one of any prosecutor's duties is, and must be, to elicit all of the facts for the Grand Jury, not to surprise, confuse or trap a witness.

With the Department thus empowered to use grand jury transcripts to refresh the recollection of prospective witnesses, surely its argument that it cannot give this witness access to these types of materials (which are not entitled to the cloak of secrecy governing

transcripts) to refresh recollection must be viewed with apprehension* and should fail.

II

THE DEPARTMENT'S PRESENT POSITION IS INCONSISTENT WITH ITS PRIOR ACTION

Moreover, the Department should not be permitted to have it both ways. The Department, for the purpose of obtaining information and leads from the witness, disclosed to his attorneys the existence and nature of the materials sought. The Department knew that those matters were to be taken up with the witness in order to assist the investigation. Presumably that disclosure was made under the authority of Rule 6(e), as we have discussed, and under the rationale of United States v. American Radiator & Standard Sanitary Corporation, supra. Having used Rule 6(e) to disclose portions of the material, the Department cannot now hide behind it when request for access is made. suggest that the Department's position is inconsistent and makes no sense.

III

THIS WITNESS HAS STANDING TO SEEK THE MATERIALS REQUESTED

The Department, without discussing the main thrust of the cases we cited in our Main Memorandum--that these materials sought

* Since Rule 6(e) does not prohibit disclosure of materials to be used for their own intrinsic value and since the "Impoundment Order" by its terms does not preclude disclosure by the Department of the materials, especially those not prepared by witnesses, both of the Government's "excuses" given to us for some months have no meaning and the Government's position is suspect.

for their intrinsic value are not within the ambit of the rule of secrecy--dwells on attempting to distinguish those cases by stating that, except for the Braniff case, they deal with successful attempts by civil litigants and Government agencies to obtain materials.

The Department's argument ignores reality. Certainly, an immunized witness who seeks to obtain documents for their intrinsic value, has more at stake than civil litigants, who are civilly suing a grand jury target, or a Senate Committee. Certainly an immunized witness who is to be put into a grand jury room without counsel and who might, because he has no recollection, appear uncooperative and be suspect of perjury, has more at stake than those successful litigants. The Department here ignores the simple facts of life, which were recognized in the Braniff case where witnesses were given access to grand jury transcripts on the basis of grounds much like those cited by the witness here.

And surely the standing recognized in Braniff is more compelling than any technical claim to standing by a civil third party litigant under the Federal Rules of Civil Procedure. Here, we seek access, not merely as a third party, but as a party to alleged conversations which will be inquired into by a Grand Jury, which the Government claims are memorialized.* In these circumstances, the

* If the witness were a defendant he would be entitled to discovery of these materials under Rule 16 of the Federal Rules of Criminal Procedure. A fortiori, a cooperative immunized witness must be entitled to recordings of his conversations and notes of conversations about which he will be examined.

standing and need of the witness cannot be questioned.*

IV

THE ANTITRUST CIVIL PROCESS ACT DOES NOT BAR DISCLOSURE

The Government intimates that the Antitrust Civil Process Act (15 U.S.C. § 1311, et seq.) bars disclosure of the materials. That statute, entitled the Civil Process Act, has absolutely nothing to do with materials gathered by a grand jury** pursuant to its subpoena but only relates to the authority of the Attorney General to issue a "Civil Investigative Demand" (Section 1312) to gather documents and what occurs when documents are so gathered.

* The Department asserts in order to counter our showing of particularized need (see e.g. In re Braniff, supra) that the particularized need standard is inappropriate here because the Grand Jury is sitting. While this novel proposition may be the Government's position, it surely does not represent the law. Moreover, other than asserting the point the Department does not argue it. We note that the Department expresses some concern that, should access be permitted, the witness would not have his memory tested under oath but might have the opportunity to "limit or conform his testimony." (Dept. Mem. p. 5). Yet this is a cooperative, about to be an immunized, witness whom the Department hopes will provide "leads" (Hauberg Afft. ¶19) and further the investigation. Other than that this argument is no doubt thought to buttress its legal argument, we do not understand the evident inconsistencies.

** Section 7 of Public Law 87-667 made it clear that the Antitrust Civil Process Act does not relate to grand juries when it stated that nothing contained in the Act shall limit the authority of the Attorney General to "(b) invoke the power of any such court to compel the production of any evidence before any such grand jury."

The purposes of the Antitrust Civil Process Act are to enable the Attorney General to determine whether there has been a violation of antitrust laws and, if so, to enable him to allege properly violations in a civil complaint. Petition of Gold Bond Stamp Co., 221 F. Supp. 391, 397 (D. Minn. 1963), aff'd, 325 F.2d 1018 (8th Cir. 1964).

Petition of Emprise Corporation, 344 F.Supp. 319, 322 (W.D.N.Y. 1972)
(Emphasis added)

A reading of the entire Antitrust Civil Process Act makes it clear that the Act relates only to civil investigative demands and the gathering of documents pursuant thereto. The tape was not gained by civil process, but by the use of a grand jury subpoena. Some of the notes were not obtained by either method. Thus, the cases under Section 6(e) holding that these documents are not guarded with secrecy and that Section 6(e) is inapplicable are the authorities which control, not the Antitrust Civil Process Act.*

V

UNITED STATES v. DEL TORO
IS NOT APPLICABLE

In oral argument on the order to show cause on this motion and in its memorandum (p. 8), the Department argued that the settled

* The Department argues that the protective purpose of the Antitrust Civil Process Act should "match if not exceed the protective purpose of restraints on disclosure in civil cases" (Dept. Mem., 7). That is not the law; if it is to be, it is for Congress, not the Department, to so determine. Moreover, the courts have held that in civil cases, even materials which the Department has gained during grand jury proceedings, are discoverable. Thus, the judicial rule, notwithstanding the Department's desires, is contra to its argument here.

in this Circuit precludes the relief sought herein, citing United States v. Del Toro, 513 F.2d 656 (2d Cir. 1975). There is no such rule in this Circuit. Del Toro does not so hold; it does not speak to the issue nor does it preclude granting access to the materials sought herein.

Del Toro was an appeal from a conviction of conspiracy, bribery and perjury. It did not relate to a pre-appearance discovery motion. The perjury conviction of the defendant arose from his testimony before a grand jury investigating the alleged bribery. He contended on appeal that the government should not have taken him before the grand jury without first informing him that certain conversations he had had with the alleged bribed official had been taped. Thus, the only issue was whether the perjury conviction was properly obtained, the court holding that it was because the prosecution is under no duty to voluntarily offer to a grand jury witness what evidence it has against him.

Del Toro dealt with whether a perjury conviction was proper. Here, we seek to avoid even the possibility of such a charge.

In Del Toro, the witness did not know of the existence of the tapes of his voice. Here, the government has chosen to make the disclosure, apparently pursuant to Rule 6(e). Del Toro does not in any way change the Rule 6(e) cases, nor rely upon, nor discuss them. It is not applicable.

CONCLUSION

For the reasons set forth above and the reasons set forth in the original memorandum in support of this motion, we respectfully request that the Court enter an order directing the Department of Justice to permit the witness to examine the tape and notes in the possession of the Department which relate to conferences or conversations in which the witness allegedly took part in the summer of 1976, and permitting the witness to make copies thereof, subject to the restriction that these materials and the contents thereof be disclosed only to the witness and his attorneys.

Respectfully submitted,

REAVIS & McGRATH

By _____
A Member of the Firm

345 Park Avenue
New York, New York 10022
(212) 752-6830

Attorneys for the Witness
Subpoenaed before the Grand Jury

OF COUNSEL:

Stephen R. Steinberg
Joseph A. Clark III

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2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 -----x

5 IN RE: :

6 THE GRAND JURY EMPANELED :

7 OCTOBER 14, 1976 :

8 -----x

9 June 30, 1977
10 10:15 a.m.

11 BEFORE:

12 HON. RICHARD OWEN,

13 District Judge.

14 APPEARANCES:

15 ROBERT E. HAUBERG, JR., ESQ.

16 PATRICIA J. BERELSON, ESQ.

17 STEPHEN J. GORDON, ESQ.

 Department of Justice

18 REAVIS & McGRATH, ESQS.

19 Attorneys for Witness

20 BY: STEPHEN R. STEINBERG, ESQ.

 JAMES C. SWEENEY, ESQ.

 JOSEPH CLARK, ESQ.

 of Counsel.

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2 (In the robing room.)

3 THE COURT: As I understand it, you have a
4 client that is going to appear before the Grand Jury and
5 be asked about a phone conversation or conversations, and
6 the Government says it has a tape of one of them and notes
7 of another or a tape of one and notes of the same one,
8 something of that kind.

9 MR. STEINBERG: Your Honor, we have a witness,
10 it is conceded, has attempted to cooperate with the Depart-
11 ment, who the Government says had two conversations about
12 year ago.

13 I don't believe they were phone conversations.
14 They may have been meetings.

15 One conversation was apparently taped. We don't
16 know at whose authority or instructions. We have some
17 information. Of course, maybe Mr. Hauberg can tell the
18 Court that the Department of Justice was in the investiga-
19 tion at the time of at least one of these meetings. One
20 meeting is supposedly taped, the other meeting may have
21 some notes taken by one of the participants to the meeting
22 and the Government has told us for the first time in their
23 papers that some notes were made by a Government attorney
24 some eleven days later of what one of the participants to
25 the conversation told the Government attorney. It is not

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exactly clear at this point.

Some months ago, prior to the service of a subpoena, the prospective witness appeared at an informal conference with Mr. Hauberg on behalf of the Department. He was asked numerous questions, and as to some conversations or meetings, he had no recollection.

Thereafter Mr. Hauberg started to, if I can use the term, drivel a little information to us. He told us that, well, he understood that the witness had a meeting or two meetings with certain people and he wonders whether or not we could find out what the witness recalls about those meetings.

We went back to the witness. We drilled the witness. The witness says, "I have no recollection at all of those meetings or such conversations."

We went back to Mr. Hauberg. Mr. Hauberg then gave us a little more information. Well, your client purportedly said X. We went back. The client said, "I have no recollection of having such a discussion."

Then finally about two or three weeks ago or a month ago Mr. Hauberg said, "Well, I want to tell you, I have a tape of one of those conversations and I also have notes of another of the conversations."

I said to Mr. Hauberg, "Mr. Hauberg, who made

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2 those notes?"

3 He said, "One of the participants to the meet-
4 ing."

5 I said, "Are they contemporaneous?"

6 Mr. Hauberg responded, "Very contemporaneous."

7 Apparently the papers in response to this
8 motion indicate something a little different. At least
9 part of the notes, they were made 11 days later and they
10 are notes of somebody from the Department of Justice.

11 We are faced with a situation where a witness
12 is cooperative, willing to cooperate. He has apparently,
13 and I might tell you the history of this --

14 THE COURT: Let me say this to you. You say
15 he's cooperating.

16 I will be more impressed with that if I hear
17 it from the Government. All right. He's talking. All
18 right.

19 MR. STEINBERG: Yes. The fact is that without
20 my requesting it, Mr. Hauberg in one conversation volun-
21 teered to me that he had already requested his superiors
22 for permission to obtain an order of immunity from this
23 Court. I didn't ask for it.

24 THE COURT: For your client?

25 MR. STEINBERG: For my client. Apparently that

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2 order was obtained on Monday. I asked Mr. Hauberg for it.

3 He says he's unable to give it to us at this
4 time.

5 Then in our conversation with him throughout,
6 and particularly on Monday, we asked Mr. Hauberg, "Why
7 would the Government be prejudiced if we just got the
8 materials, let him review it and then appeared? Because
9 there was some pressure on us to have him appear yesterday
10 and today.

11 In fact, as the papers say, a second subpoena
12 was served. We don't understand why, but it was served.

13 Mr. Hauberg has always known that the man does
14 not need a second subpoena to come in.

15 Mr. Hauberg said, "We would like to follow up
16 leads that the witness might give us when he testifies."

17 Now, prior conversations have indicated to us
18 that what the Government is looking for is for our witness
19 to confirm that some of the things he may have said were
20 put into his head by others, and other names have been
21 specifically mentioned to us during the course of this
22 investigation as possible --

23 THE COURT: I think you are slipping off the
24 point, though, here which is really quite narrow.

25 MR. STEINBERG: I want you to understand this,

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2 your Honor.

3 The fact is that what the Government wants is
4 for our witness to help them. The Government offered our
5 witness immunity so that the witness can help. The wit-
6 ness can't help unless he has some kind of reasonable access
7 to these mysterious conversations, these mysterious tapes.

8 In addition, I think the Court knows --

9 THE COURT: Again you say the Government wants
10 him to help and yet I haven't heard them say that. Their
11 position is inconsistent with that. I also would be sort
12 of curious to know whether there is any -- obviously if they
13 talked to you about an immunity order, there is some view
14 on their part that he is a possible target here absent
15 other factors, right?

16 MR. STEINBERG: Let me just say one further
17 thing.

18 THE COURT: What you have got is a client who
19 may well be trying in this Grand Jury to see if by his
20 cooperation he cannot avoid something that may be unpleasant
21 to him.

22 MR. STEINBERG: Can I respond to that, your
23 Honor?

24 At the first major meeting we had with Mr.
25 Hauberg and the only meeting we had with Mr. Hauberg at

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2 which the witness came in, after the witness was finished,
3 I asked Mr. Hauberg, "Is this witness a target?"

4 Mr. Hauberg said, "Not at this time."

5 He has never indicated to me directly that the
6 witness is a target. What he's indicated to me is two
7 things.

8 One, that we have cooperated with the Department
9 more than any other attorneys involved in this matter.
10 He said it to Mr. Clark and he said it to me. We have
11 worked very, very hard to try and get him the information
12 he's looked for.

13 Second, what he wants to do is get this witness
14 to try and recall these conversations so that possibly the
15 witness will indicate that he had a prior discussion with
16 somebody else at which a certain idea was implanted in his
17 mind and he delivered this idea to the people who were
18 involved in this investigation.

19 So it is clear that Mr. Hauberg is looking to
20 use this witness to give him a lead to somebody else.

21 I don't believe that the witness at this point
22 is looking to protect himself against anything.

23 I might tell the Court that my experience with
24 this witness, who is a substantial business executive, is
25 that he's got a lousy, lousy recall of specifics. That's

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2 what we are here to avoid, the possibility that he's going
3 to be prejudiced by going into a Grand Jury room under
4 these circumstances and being hit in the head with something
5 that he just doesn't recall unless we can sit with him and
6 plunge it.

7 THE COURT: Let me hear from the Government.

8 Yes, sir.

9 MR. HAUBERG: Robert Hauberg, Jr., your Honor,
10 for the Government.

11 The Government's position is at this stage in the
12 investigation we are not certain that Mr. Kellogg himself is
13 in fact, being cooperative. I have no quarrel with the
14 efforts of his counsel in terms of their attempting to get
15 information from him and convey it to us so that we can
16 assess his position and his role in the investigation.

17 We have made it clear from our first interview
18 with the witness that we were puzzled by certain factors,
19 certain facts he claims not to recall.

20 Our position is that he ought to be able to
21 recall those, and on the basis of the continued delays for
22 various reasons, his unavailability apparently to counsel
23 recited on some occasions, his claimed lack of recall as
24 communicated to us through counsel, that he may be trying
25 to walk a very tight line between appearing to be coopera-

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2 tive and not appearing or not getting involved in the
3 situation.

4 There comes a point in time when each witness
5 has got to be put to the test of testifying under oath. We
6 believe that time has come. We believe the best means of
7 proceeding to further the investigation is to have him
8 appear before the Grand Jury. That's what we have sought
9 to do here.

10 THE COURT: You say he may or may not be a
11 target? He's a potential target at this point?

12 MR. HAUBERG: Yes.

13 THE COURT: We don't rule him out as a target,
14 in other words?

15 MR. HAUBERG: That is correct. We thought that
16 was essential, in order to avoid any controversy over Fifth
17 Amendment questions, that we be prepared to immunize him
18 and we have, in fact, taken clearance for that --

19 THE COURT: If you want to use it.

20 MR. HAUBERG: If we want to use it, that's
21 correct.

22 Our position is that counsel for the witness
23 have failed to show that he is any different from any other
24 witness in terms of the particular fears expressed by
25 counsel, that is, that he might make some misstatement or h

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2 has not a full recollection of a particular event. Any
3 witness who goes into the Grand Jury may have that particu-
4 lar concern. We feel that the legal position brought out
5 by counsel for the witness, that they have not sustained
6 any particularized or compelling need, have not shown any
7 particular case law which requires or permits a witness in
8 an on-going investigation to have access to the documents
9 produced by another witness in the same investigation.

10 We believe that both our legal position and the
11 factual motion here would support your Honor's denying the
12 motion to compel disclosure.

13 THE COURT: Mr. Steinberg, do you have anything
14 else you want to say at this point?

15 MR. STEINBERG: Yes, your Honor, just one
16 thing.

17 I think Mr. Hauberg has misread both the
18 legal requirement and the cases when he says we failed to
19 show particularized need.

20 First of all, under the cases which hold 6E not
21 applicable to these types of motions, you need not show
22 need. However, we can get over that because the chief judge
23 in the Western District of Texas in the Braniff Airways case
24 in an even harder case than this has said that when some-
25 body is going before the Grand Jury and they have not a good

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2 recollection of what occurred sometime ago and, in fact,
3 what occurred at the last time they testified before the
4 Grand Jury, in view of the nature of the Grand Jury proceed-
5 ings and in view of a justified fear of a possible charge
6 of perjury, they are entitled to their Grand Jury tran-
7 script, which is even more sacrosanct than documents
8 that came from outside the Grand Jury.

9 I think on that basis alone, your Honor, given
10 the facts here, this witness is not going to show these
11 materials to anyone. We can put whatever restrictions we
12 want on the disclosure, but the witness is entitled to dis-
13 closure before he is put into the Grand Jury room with or
14 without immunity. 6E permits Mr. Hauberg to do it.

15 THE COURT: Mr. Steinberg, I am afraid I am con-
16 strained to disagree with you.

17 As I told you before, when all you lady and
18 gentlemen came in, I had gone through the papers medium
19 heavy once. I have obtained and have read the Braniff
20 case in Texas, which I don't think really fits here in that
21 there the witness had been twice before the Grand Jury
22 on a number of prior occasions. In addition to that, if the
23 Braniff case were before me, I would have decided it the
24 other way.

25 It seems to me that the Government here is not

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2 required to give you these materials so that, in effect,
3 you can prep your witness before going in, either go into
4 the Grand Jury, and he can say he does 't remember or he
5 remembers what he remembers or he can take the Fifth Amend-
6 ment or he can take any number of positions. I don't think
7 the Government is obliged to give him this before so that
8 arguably he can look at it, see how things fit into the
9 intersticies of what somebody says he has said or is going
10 to say what he has said.

11 I think the Government is entitled to his
12 unvarnished recollection or absent of it, as the case may
13 be, under the circumstances.

14 I, therefore, feel obliged to deny your motion
15 to compell the turnover.

16 Where does that leave you? Is the Grand Jury
17 sitting this morning?

18 MR. HAUBERG: Sitting this morning and this
19 afternoon, your Honor.

20 THE COURT: You have a subpoena I take it that
21 calls for his appearance at some hour?

22 MR. HAUBERG: We served one calling for his
23 appearance yesterday. An order was entered on the 28th by
24 Judge Briant to stay his appearance until this particular
25 motion was resolved.

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2 THE COURT: All right.

3 I take it he's available then this morning.

4 At what hour is your Grand Jury sitting?

5 MR. HAUBERG: They are available at the present
6 time. We had talked with counsel about having him in this
7 afternoon.

8 THE COURT: 2 o'clock?

9 MR. HAUBERG: 2 o'clock.

10 MR. STEINBERG: Your Honor, I would respectfully
11 ask for a stay so that we can go to the Circuit.

12 THE COURT: I deny that. You can chug up
13 there right now in the elevator, but I am directing that you
14 client appear at 2 o'clock and deal with the problems that
15 face him in the Grand Jury accordingly.

16 All right.

17 MR. STEINBERG: Thank you, your Honor.

18 THE COURT: Nice to see you.

19 * * * * *

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE THE GRAND JURY
EMPANELLED OCTOBER 14, 1976

: NOTICE OF APPEAL
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-----x \

Please take notice that the witness in the above named proceeding hereby appeals to this Court from the Memorandum Order entered on June 20, 1977, by the Honorable Richard Owen, United States District Judge for the Southern District of New York denying the witness (in whose favor an immunity order was entered in the United States District Court for the Southern District of New York on June 27, 1977), access to: Notes of an alleged conversation on June 3, 1976, between the witness and a second person recorded after the conversation by a Government Attorney during an interview; notes of an alleged conversation between the witness and a second person on June 28, 1976, made by the second person; and a tape recording of an alleged conversation on June 11, 1976, among the witness, the second person and one other person, recorded by the second person and the transcription of such tape, prior to his appearance before a Grand Jury empanelled in this

District on October 14, 1976, and from each and every part of the aforesaid order.

New York, N.Y.
June 30, 1977

Yours, etc. .

REAVIS & McGRATH

By: Stephen R. Steinberg

Attorneys for a witness
Subpoenaed to Appear
before Grand Jury

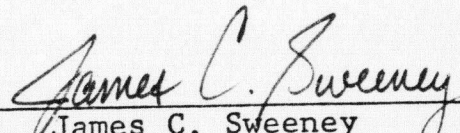
To: Robert E. Hauberg, Esq.
Special Assistant United States Attorney
Attorney, Antitrust Division
Department of Justice
26 Federal Plaza
New York, New York

AFFIDAVIT OF SERVICE BY MAIL

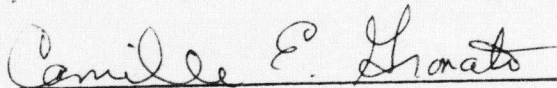
STATE OF NEW YORK)
 : ss.:
COUNTY OF NEW YORK)

JAMES C. SWEENEY, being duly sworn, deposes and
says:

I am not a party to this action. On July 22,
1977, I served a copy of the annexed Appellant's Brief
and Joint Appendix upon The United States Department of
Justice, Antitrust Division, Attn: John Powers, Esq.,
Washington, D.C. 20530 by causing the same to be deposited
at a United States Postal Service Office in a post-paid,
properly addressed envelope for delivery by Express Mail
to said attorney at the address above stated.


James C. Sweeney

Sworn to before me this
22nd day of July, 1977.


Notary Public

CAMILLE E. GRANATO
NOTARY PUBLIC, State of New York
No. 31-1532330
Qualified in New York County
Commission Expires March 30, 1979